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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

October 6, 1997

BY HAND DELIVERY

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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Stop Code - 1170
Washington, D.C. 20554

Re: Reply Comments of the NCCTA
CS Docket No. 95-184; MM Docket No. 92-260

Dear Mr. Caton:

Transmitted herewith, on behalf of the North Carolina Cable Telecommunications Association, are a facsimile of an original and eleven copies of Reply Comments to be filed in the above-referenced matter.

If any questions should arise during the course of your consideration of this matter, it is respectfully requested that you communicate with this office.

Very truly yours,

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.

Mark J. Prak
Counsel to North Carolina Cable
Telecommunications Association

MJP:rb

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Telecommunications Services	)	CS Docket No. 95-184
Inside Wiring	)	
	)	
Customer Premises Equipment	)	
	)	
	)	
In the Matter of	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	MM Docket No. 92-260
and Competition Act of 1992:	)	
	)	
Cable Home Wiring	)	

REPLY COMMENTS OF THE NORTH CAROLINA CABLE TELECOMMUNICATIONS ASSOCIATION

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October 6, 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Telecommunications Services Inside Wiring	)	CS Docket No. 95-184
	)	
Customer Premises Equipment	)	
	)	
In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992:	)	MM Docket No. 92-260
	)	
Cable Home Wiring	)	

REPLY COMMENTS OF THE NORTH CAROLINA CABLE TELECOMMUNICATIONS ASSOCIATION

The Commission has embarked upon an ill-considered regulatory change with regard to its cable inside wiring rules. Out of a desire to promote what it sees as "competition," the Commission is proposing to adopt revisions to its rules affecting inside wiring in multiple dwelling unit (MDU) buildings which would deny consumers residing in MDUs the opportunity to choose cable programming as their video product of choice. In the process, the FCC would enrich the owners of

MDUs while denying the persons residing in them the ability to receive local public, educational and government access channels, local television signals, and emergency information.

The net result of the implementation of the Commission's proposed rule changes is that MDU owners -- concerned not about their tenants as the Commission naively believes -- will remove cable operators from their buildings, so that the MDU owners can contract with alternative video providers and deliver all of their tenants in bulk to such providers in exchange for money. This is not competition that will benefit consumers. Instead, putting such a regulatory "thumb on the scale" will simply shift subscribers from one video provider to another without any opportunity for consumer choice.

What will be lost if the Commission's proposed rules are adopted will be the ability of real people, who happen to live in an MDU, to watch meetings of their local city council or county commission on the public access channels provided, at significant cost, by their franchised local cable operator. In addition, persons residing in MDUs will be cut out of the FCC's new Emergency Alert System, because the newly adopted EAS rules do not apply to SMATV operators.[1] These public interest considerations are not insubstantial. The Commission has observed that MDUs account for some 28% of the housing market in the United States.[2]

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[1] Emergency Alert System, Second Report and Order, FCC 97-338 (Released: September 29, 1997), p. 23, ¶ 42.

[2] Further Notice, p. 6, n. 29.

Apparently, the Commission is in a hurry to adopt the proposed rule changes.[3] But, decisions made in haste often reflect incomplete consideration of unintended consequences. So it is with this proposal. The current competitive environment is far from ideal. North Carolina has no access-to-premises legislation, so landowners can, and do, attempt to dictate their tenants' video choices. Consumer choice for individual tenants would be a better policy. That can only happen with facilities-based competition.

In general, the Commission's proposed rules would, if adopted, create new procedural requirements for the disposition of home run wiring in MDUs where the cable operator owns the wiring, but has no enforceable legal right to remain on the premises after termination of service. The North Carolina Cable Telecommunications Association ("NCCTA") agrees that the Commission has correctly rejected proposals to move the demarcation point. The Commission has also properly refrained from regulating the disposition of wiring when the incumbent operator has a legal right to remain on the premises.

The NCCTA believes that the most glaring flaw in the Commission's proposal is the fact that it will encourage exclusive contracts between MDU owners and alternative video providers. Such exclusive contracts will ultimately deprive many viewers from having access to channels dedicated to the public interest--channels that cable operators, unlike other multi-channel video providers, are required by law to carry because of their public interest importance.

[3] After five years, it was unwilling to grant any extension of time for further comments on its proposals.

I. The Commission's Proposal Does Not Reflect the Reality That MDU Owners Have a Significant Anti-Competitive Incentive to Keep the Operators' Home Run Wiring and Maintain an Exclusive Relationship With Only One Video Provider

In the Further Notice, the Commission asserts that a cable operator doing business in North Carolina has failed to cite any example of two-wire competition in our state.[4] The fact is that, as the result of state court litigation this past year, an MDU owner in Durham, North Carolina, has post-wired its buildings to allow two-wire competition with the local cable company in the provision of video services. This result came about only after the MDU owner understood that the incumbent, franchised cable operator was not going to leave without a judicial determination of its rights under its contract. Consumers in this MDU are now plainly better off since they still have access to the incumbent cable operator. They also have a choice of video service providers. The landlord's business plan was, not surprisingly, to simply bundle cable in as a part of the rent and force the tenants to accept the landlord's video product. The fact is: landlords will allow for a second wire if they think they can make money from it. Facilities-based competition is critical to attaining competitive choice.

In the Further Notice, the Commission naively appears willing to accept the claims by landlords' groups that, given competition in the rental housing market, they cannot do their tenants wrong or the tenants will leave. This contention misapprehends the elasticity of demand for video services as a component of the primary housing decision to be made. A tenant who is a party to a lease does not always have the ability to move his or her residence just because a landlord decides to bring in a new video provider. Comcast's comments contain a solid evidentiary refutation of the

[4] Further Notice at p. 16, ¶ 29.

notion that MDU owners are selecting video providers with a view toward providing their tenants with the widest possible choice of services at the lowest possible price. Comcast Comments at pp. 4-8. The fact is that MDU owners are going to meetings and conventions where they are told about the money to be made by charging video providers substantial sums of money for access to MDUs. These "doorbuster" fees have nothing to do with promoting consumer welfare. The Commission should recognize that the MDU industry is spinning a canard when it suggests that aesthetics are somehow a barrier to facilities-based competition.

II. The Commission's Proposal Will Enable MDU Owners to Enter Into Exclusive Contracts with Alternative Providers That Do Not Carry Public Access Channels

Under the law, cable operators are required to carry certain programming, such as PEG access channels, local television stations and EAS transmissions to serve the public interest. Under Section 611 of the Communications Act, a franchising authority may establish requirements for a cable franchise with respect to "the designation or use of channel capacity for public, educational or governmental use." 47 U.S.C § 531(a) (1996). In addition, the franchising authority may designate channel capacity for public, educational or governmental use. 47 U.S.C § 531(b) (1996). Also, cable operators are required to carry the signals of certain commercial and non-commercial television stations. 47 U.S.C §§ 534(a), 535(a) (1996) (requiring inter alia that each cable operator carry the signals of certain local commercial and qualified noncommercial educational television stations); 47 U.S.C § 535(l) (1996) (defining "qualified noncommercial educational television stations" as "owned and operated by a public agency, nonprofit foundation, corporation, or association"); 47 C.F.R. § 76.56; see also Turner Broadcasting Sys. v. FCC, 113 S.Ct. 2445, 123 L.Ed.2d 642 (U.S. 1993) (finding 47 U.S.C. § 535 to be "presumptively constitutional").

Congress has yet to impose the same public service obligations on alternative video providers such as SMATV operators. As discussed above, under the Commission's proposed rules, MDU owners will have a tremendous financial incentive to enter into an exclusive contract with one provider. Some MDU owners are likely to enter into exclusive contracts with SMATV operators after terminating an incumbent cable operator. If this occurs, the residents of those MDUs will be denied access to public interest programming that cable operators are required to provide pursuant to the Communications Act. The Commission surely cannot intend such a result. Such a result fails the common sense test.

III. The Commission Lacks Jurisdiction to Adopt Rules Regulating the Disposition of Home Run Wiring

The NCCTA agrees with the many commenters who argued that the Commission lacks jurisdiction to adopt rules regulating the disposition of home run wiring.[5] Section 624(i) of the Communications Act of 1934 specifically directs the Commission to "prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber." 47 U.S.C. § 624(i) (emphasis added). Home run wiring plainly does not constitute wiring "within the premises" of a subscriber. Because the

[5] See September 25, 1997 Comments filed separately by US West, Inc., pp. 4-6; National Cable Television Association, Inc., pp. 6-10; Cable Telecommunications Association, pp. 3-9; Tele-Communications, Inc., pp. 4-8; Jones Intercable, et al., pp. 2-4; and Time Warner Cable, pp. 49-62.

Commission seeks to regulate the disposition of MDU wiring located outside a subscriber's premises, its proposal clearly exceeds its authority delineated in section 624(i).

The Commission, moreover, cannot rely on its general rule making authority in sections 4(i) or 303(r) of the Communications Act as a basis for regulating the MDU wiring outside the subscriber's premises. Section 4(i) states that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions," and section 303(r) permits the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act." Unlike section 624(i), neither section 4(i) nor 303(r) makes an explicit reference to the disposition of wiring after a subscriber terminates an operator. Thus, the Commission has only a weak statutory basis for overriding Congress' specific limitation on its authority to regulate the wiring found "within the premises of such subscriber."

IV. State Courts Are the Proper Entities to Determine Whether an Incumbent Operator Has a Right to Keep its Home Run Wiring on the Premises After Termination

The Commission states that the proposed rules will pertain only to those incumbent operators that lack a cognizable legal right to remain in the MDU. Assuming the Commission actually has the jurisdiction to issue these proposed rules, the threshold question is whether the incumbent operator has an enforceable legal right to remain on the premises after termination. This question, as with most issues involving property and contract rights, is a matter of state substantive law. Obviously, the Commission lacks the expertise and the resources to render determinations--in up to fifty states--whether operators retain a legally enforceable right to remain on the premises after termination.

Accordingly, NCCTA agrees with the point made by several commenters that a cable operator should be entitled to initiate a state court proceeding to demonstrate that it has an enforceable right to remain on the premises.[6] If such a proceeding is initiated, all further procedures and timetables under the proposed rules should be stayed pending the outcome of that proceeding.

The Commission should also refrain from establishing a presumption whether the operator has a legal right to remain on the premises.[7] It is simply not the province of the Commission to establish such a broad presumption when an operator's property and contract rights lie in the balance. After all, no presumption in this case can account for the nuances and variations contained in the laws of the fifty states. For example, many cable operators enjoy a right of access by virtue of independent written easements; these easements vary substantially from state to state. A generic presumption would seriously prejudice an operator's rights and constitute a violation of the guarantee of Due Process Clause of the United States Constitution.

V. If a Cable Operator Offers to Sell Home Run Wiring at a Reasonable Price and the Offer Is Declined, the Operator Should Not Be Required to Do Anything Further.

Under the proposed rules, cable operators that lack an enforceable legal right to remain on an MDUs premises after termination must elect one of three options regarding the disposition of home run wiring: (1) remove the wiring; (2) abandon the wiring; or (3) sell the wiring. If the

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[6] See September 25, 1997 Comments filed separately by National Cable Television Association, Inc., pp. 14-20; Tele-Communications, Inc., pp. 12-15; Jones Intercable, et al., pp. 12-15; and Adelphi Cable Communications, et al., pp. 8-10.

[7] See September 25, 1997 Comments filed separately by National Cable Television Association, Inc., pp. 21-22; Cable Telecommunications Association, pp. 9-11; and Cablevision Systems Corporation, pp. 4-10.

operator and the MDU owner are unable to agree on a price within 30 days of the incumbent operator's election to sell the wiring, the incumbent is required to remove or abandon the wire. The MDU owner, however, can still offer to purchase the wiring at that time if the incumbent elects to abandon the wiring. This procedure gives MDU owners a strong incentive to delay negotiations in order to force an incumbent to commit to the abandonment of its wiring. After that point, the MDU owner would be able to purchase the incumbent operator's wiring at a "fire sale" price.

The NCCTA endorses the following proposal which was suggested by several commenters: if an incumbent operator elects to sell its wiring at a reasonable price and the MDU owner declines, the operator assumes no further obligations.[8] In other words, the operator would not be required to elect to remove or abandon the wiring. The Commission would be in charge of establishing a range of "reasonable prices" to reflect current market value of this wiring. This proposal will encourage an MDU owner to negotiate in good faith to purchase the wiring of an outgoing operator at a fair price.

Conclusion

The Commission is about to make a serious mistake. The proposed inside wiring rules fail Chairman-designate Bill Kennard's three-part test for evaluating policy choices. First, "competition must not be the goal in itself. It is the FCC's job to work with Congress to make sure that competition serves consumers." As demonstrated above, the "competition" generated by the rules

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[8] See September 25, 1997 Comments filed separately by US West, Inc., pp. 12-13; National Cable Television Association, Inc., pp. 22-25; and Tele-Communications, Inc., pp. 17-21.

proposed in these dockets will not serve consumers -- they will serve only the financial interests of MDU owners.

The second component of the test is that "communications should serve communities." The proposed rules will restrict MDU residents' access to community access channels, EAS warnings and, in some cases, the signals of local television stations. So, the rules fail part two.

The final component of the test is "common sense." As Mr. Kennard noted in his testimony, "The Commission's rules should be clear and easy to understand. They should be practical and reflect an understanding of the markets and businesses they affect. And, they should be in touch with people's real needs and daily demand."

The Commission's proposed revisions to the cable inside wiring rule clearly fail this simple and logical three-part test. Whatever the Commission does, its first touchstone should be to "do no harm." This is an issue that should be given more time to percolate.

Respectfully submitted,

NORTH CAROLINA CABLE TELECOMMUNICATIONS ASSOCIATION

By ______________________

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October 6, 1997

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